CORRECTED JUDGMENT: The text of the original judgment has been changed *per* the corrigendum released June 20, 2017. (A copy of the corrigendum is appended to this corrected judgment.)

QUEEN'S BENCH FOR SASKATCHEWAN

Citation: **2017 SKQB 176**

Date: **2017 06 15**
Docket: QBG 2611 of 2016
Judicial Centre: Regina

BETWEEN:

CHARMAINE STICK AND CANADIAN TAXPAYERS FEDERATION

APPLICANTS

- and -

ONION LAKE CREE NATION

RESPONDENT

Counsel:

Jason Clayards — for the applicants
Garry Appelt, Q.C. and Annemarie Clarke — for the respondent

JUDGMENT
June 15, 2017

BARRINGTON-FOOTE J.

[1] The applicant Charmaine Stick is a member of the respondent Onion Lake Cree Nation [Onion Lake]. Onion Lake is a band within the meaning of the *Indian Act*, RSC 1985, c I-5. The applicant Canadian Taxpayers Federation [CTF] is a non-profit corporation, with a mandate of promoting the responsible and efficient use of tax money.

[2] There are several applications before me. The applicants have applied pursuant to ss. 10 and 11 of the *First Nations Financial Transparency Act*, SC 2013, c 7 [*Act*], for an order requiring Onion Lake to comply with the financial disclosure obligation duties specified by ss. 7 and 8 of the *Act*. Ms. Stick has applied, in the alternative, for similar relief at common law and based on the duty imposed by s. 8(2) of the *Indian Bands Revenue Moneys Regulations*, CRC, c 953. In response, Onion Lake has applied for a stay of this application, principally on the ground on that this action raises issues that are already before the Federal Court in other proceedings.

[3] For the reasons that follow, I have decided that the applicants are entitled to the relief sought pursuant to the *Act*, and that the Onion Lake application must be dismissed. Given the breadth of the relief provided by the *Act*, I did not find it necessary to deal with Ms. Stick's applications in the alternative.

A. *The First Nations Financial Transparency Act*

[4] The purpose of the *Act* is specified in s. 3, which provides as follows:

> **3** The purpose of this Act is to enhance the financial accountability and transparency of First Nations by requiring the preparation and public disclosure of their audited consolidated financial statements and of the schedules of remuneration paid and expenses reimbursed to a First Nation's chief and each of its councillors — acting in their capacity as such and in any other capacity, including their personal capacity — by the First Nation and by any entity that, in accordance with generally accepted accounting principles, is required to be consolidated with the First Nation.

[5] To achieve that purpose, s. 5 of the *Act* imposes an obligation for First Nations to prepare consolidated financial statements, which are defined as follows:

> **2(1)** ***consolidated financial statements*** means the financial statements of a First Nation — prepared in accordance with generally accepted accounting principles — in which the assets, liabilities, equity, income, expenses and cash flows of the First Nation and of those entities that are required by those principles to be included are presented as those of a single economic entity, as if the First Nation were a government reporting on its financial information.

[6] First Nations are also required by s. 6 to prepare a Schedule of Remuneration and Expenses [Schedule], setting out the remuneration paid and the expenses reimbursed to its Chief and councillors in any capacity. The consolidated financial statements, the Schedule, and related auditors' documents specified in s. 7 must be provided to members, and posted on an internet site accessible not only to members, but to the public. That obligation is imposed by ss. 7 and 8:

> 7(1) A First Nation must, on the request of any of its members, provide the member with copies of any of the following documents:
>
> (a) its audited consolidated financial statements;
>
> (b) the Schedule of Remuneration and Expenses;
>
> (c) the auditor's written report respecting the consolidated financial statements; and
>
> (d) the auditor's report or the review engagement report, as the case may be, respecting the Schedule of Remuneration and Expenses.
>
> (2) The First Nation must provide the copies without delay, but has until 120 days after the end of the financial year in question to provide them if the request is received within those 120 days.

> (3) A First Nation may charge a fee for providing the copies, but the fee must not exceed the cost of the service.
>
> **8**(1) A First Nation must publish the documents referred to in paragraphs 7(1)(a) to (d) on its Internet site, or cause those documents to be published on an Internet site, within 120 days after the end of each financial year.
>
> (2) The documents referred to in subsection (1) must remain accessible to the public, on an Internet site, for at least 10 years.
>
> (3) Publishing any document on an Internet site is insufficient to discharge the First Nation's duty to make copies of it available to its members who request that document.

[7] The remedial provisions of the *Act* of concern on this application are ss. 10 and 11, which are as follows:

> **10** If a First Nation fails to provide copies of any document under section 7, any member of that First Nation may apply to a superior court for an order requiring the council to carry out the duties under that section within the period specified by the court.
>
> **11** If a First Nation fails to publish any document under section 8, any person, including the Minister, may apply to a superior court for an order requiring the council to carry out the duties under that section within the period specified by the court.

B. Background

[8] There is no dispute between the parties as to whether Onion Lake has complied with the obligations imposed by ss. 7 and 8 of the *Act*. It refuses to do so. It has offered to permit Ms. Stick to read the consolidated financial statements at the band office. However, it has repeatedly refused to deliver copies of the documents specified in s. 7(1) of the *Act* to her, and has failed to post those documents on the internet. It has failed to offer any accommodation to the CTF.

[9] There is no evidence before me as to the political or economic reasons why Onion Lake has refused to provide and post the specified information. There is, for example, no evidence that Onion Lake's commercial interests would be negatively affected. There was, however, evidence that Onion Lake has taken the position in two actions in the Federal Court of Canada that it is legally entitled to refuse. Those actions are *Onion Lake Cree Nation v Governor General of Canada and Others*, T-2428-14 [*Onion Lake Action*], which was filed November 26, 2014, and, *Canada (Attorney General) v Cold Lake First Nations,* T-2492-14 [*Disclosure Application*], which was filed December 8, 2014. Indeed, Councillor Dolores Pahtayken deposed that Onion Lake does not post its consolidated financial statements because of the Federal Actions.

[10] The Federal Court actions are the foundation for the respondent's stay application. The *Onion Lake Action* was commenced by Onion Lake in response to enforcement action taken by Canada pursuant to the *Act*. In that action, Onion Lake has claimed damages and declaratory and injunctive relief – including a declaration that the *Act* is of no force and effect as against Onion Lake – based on alleged breaches of the *Canadian Charter of Rights and Freedoms* [*Charter*], infringement of its treaty and aboriginal rights, and breaches by the Crown of its fiduciary obligations and duty to consult [constitutional issues].

[11] The *Disclosure Application* is an application by Canada pursuant to s. 11 of the *Act*, seeking the same relief as the CTF: that is, an order that Onion Lake and other respondent First Nations post financial information in accordance with s. 8. In response, Onion Lake and the other respondent First

Nations advised the Federal Court that they would challenge the constitutionality of the *Act* based, among other things, on the alleged infringement of their rights under Treaty Six and Treaty Eight. Further, the Sawridge First Nation – another of the respondents in the *Disclosure Application* – has also commenced an action in the Court of Queen's Bench of Alberta challenging the constitutionality of the *Act* [*Sawridge Action*].

[12] The *Onion Lake Action* remains active. The *Disclosure Application* does not. It was stayed by Barnes J. in *Canada (Attorney General) v Cold Lake First Nations*, 2015 FC 1197 [*Cold Lake*]. That decision resulted from an application by Sawridge and Onion Lake for injunctive relief in the form of a constitutional exemption from the obligation to disclose imposed by s. 8 of the *Act* pending the resolution of the constitutional issues raised in the *Disclosure Application*, or in the alternative, that the court stay the *Disclosure Application* pending the outcome of the *Onion Lake Action* and the *Sawridge Action*. Barnes J. granted a stay pursuant to s. 50 of the *Federal Courts Act*, RSC 1985, c F-7 [Federal Stay], which engaged a different legal test than that specified for interrogatory injunctive relief in *RJR-MacDonald Inc. v Canada (Attorney General)*, [1994] 1 SCR 311.

[13] Barnes J.'s reasoning in relation to the Federal Stay is at paras. 11-27 of his judgment. He did not refer to confidentiality concerns. He dealt with the matter primarily as a choice between competing parallel proceedings. That is, he asked whether the constitutional issues should be resolved in the *Cold Lake* action, or in the *Disclosure Application*. He focused first, and at some length, on the point first made at para. 16 of his reasons:

> **16** Where the parallel proceedings involve a contest between an action and an application, a further important consideration is whether the issues raised are more appropriately resolved by way of full discovery and trial or summarily by way of an application…

[14] Having commented (at paras. 17) that the law on this point seems "fairly well settled" in relation to cases relating to treaty and aboriginal rights, he discussed several cases where courts determined that a trial was the preferred procedure. He noted (at para. 19) that the issues in *Cold Lake* would "of necessity, call for the development of a considerable evidentiary record", commenting that this factor "strongly favours an action over an application". He noted the considerable overlap in the legal issues raised in the *Sawridge Action*, the *Cold Lake* action and the *Disclosure Application*, and the resulting potential for inconsistent outcomes.

[15] Finally, Barnes J. referred to a balancing of interests. He noted (at para. 24) that these sorts of disputes about treaty and aboriginal rights should be the subject of consultation, and where possible, accommodation, and where necessary, litigation. It was his opinion that highly adversarial conduct by the Crown or a First Nation, which might aggravate a legitimate disagreement that is before a court, should be avoided. He found that this consideration weighed in favour of staying the *Disclosure Application*, particularly given the enforcement action Canada had already taken.

[16] In the result, Barnes J. stayed the *Disclosure Application* until further order of the court. A case management judge has been appointed for the *Onion Lake Action*, and an interlocutory application which relates in some fashion to the participation of the Governor General has been made. However,

despite the passage of almost two and a half years since the action was commenced, discoveries have not yet been scheduled.

C. Analysis

[17] Curiously, Onion Lake did not defend this application on the basis of the constitutional issues. Rather, counsel for Onion Lake – who does not act in the *Disclosure Application* or the *Onion Lake Action* – advised that it may launch a separate action relating to the constitutional issues in this Court if this application is not stayed. At the hearing of this application, he confirmed that the decision to do so would require a decision by the Onion Lake Chief and Council, which has not yet been made.

[18] I advised counsel at the beginning of this hearing that Onion Lake's failure to raise the constitutional issues might affect the outcome of the stay application. I also noted that Rule 3-53 of *The Queen's Bench Rules* authorizes the court to order that rules which apply to an action started by statement of claim apply to an action started by an originating application. Onion Lake nonetheless did not seek an adjournment to enable counsel to seek instructions to raise the constitutional issues in this action. It instead chose to pursue this application based on the material before me. I have made my decision accordingly.

1. Stay Application: Legal Principles

[19] The respondent's application was initially based on ss. 29 and 37 of *The Queen's Bench Act, 1998*, SS 1998, c Q-1.01 [*QBA*], and the court's inherent jurisdiction – or as the applicants put it, its authority pursuant to the common law – to prevent an abuse of process. Those sections of the *QBA* provide as follows:

> **29**(1) The court shall grant to the parties to an action or matter all remedies to which the parties appear to be entitled with respect to any legal or equitable claims that they have properly brought forward so that:
>
> (a) all issues in controversy between the parties are determined as completely and finally as possible; and
>
> (b) a multiplicity of legal proceedings concerning the issues is avoided.
>
> (2) relief pursuant to subsection (1) may be granted either absolutely or on any terms and conditions that a judge considers appropriate.
>
> ...
>
> **37**(1) Nothing in this Act prevents a judge from directing a stay of proceedings in any action or matter before the court if the judge considers it appropriate.
>
> (2) Any person, whether a party or not to an action or matter, may apply to the court for a stay of proceedings, either generally or to the extent that may be necessary for the purposes of justice, if the person may be entitled to enforce a judgment, rule or order, and the proceedings in the action or matter or a part of the proceedings may have been taken contrary to that judgment, rule or order.
>
> (3) On an application pursuant to subsection (2), a judge shall make any order that the judge considers appropriate.

[20] The respondent conceded at the hearing that s. 29 does not apply, as that section relates to the court's obligation to grant "all remedies to which the parties appear to be entitled". That concession accords with the court's comments in *Saskatchewan Power Corporation v Alberici Western Constructors Ltd.*, 2016 SKCA 46 at paras 36-37. The respondent also agreed that s. 37(2) of the *QBA* does not apply, as Onion Lake is not an applicant that is entitled to enforce a judgment, rule or order.

[21] The respondent also relied on s. 37(1) of the *QBA*. There is authority for the proposition that s. 37 grants the court jurisdiction to stay

proceedings: see, for example, *Cameron v Saskatchewan Institute of Agrologists*, 2016 SKQB 313 [*Cameron*], *Martens v Wawanese Life Insurance Co.*, 2011 SKQB 448, 387 Sask R 184 and *Moose Jaw (City) v Elite Insurance Co.*, 2005 SKQB 137. Those decisions are to the same effect as *Royal Bank of Canada v Jarvie*, 1987 CarswellSask 844 (Sask QB) (WL) [*Jarvie*]; appeal dismissed (1988), 64 Sask R 231 (Sask CA), which dealt with the predecessor to s. 37, being s. 44(6) of *The Queen's Bench Act,* RSS 1978, c Q-1 (since rep). In *Jarvie*, Grotsky J. commented as follows:

> **15** Section 44(6) of the Act clothes this Court with statutory jurisdiction to direct that any cause or matter pending before it be stayed, either generally, or so far as may be necessary for the purpose of doing justice. In the exercise of this jurisdiction the Court may make such order as to it seems fit and just in the circumstances.
>
> **16** Apart altogether from the jurisdiction conferred upon it by *The Queen's Bench Act*, the Court has an inherent jurisdiction to direct a stay in a proper case.

[22] Section 44(6) differed from s. 17 of the *QBA*. It expressly provided that a person could apply for a stay, as follows:

> **44**(6) ...
>
> Provided that nothing in this Act contained shall disable the court from directing a stay of proceedings in any cause or matter pending before it if it shall see fit; and any person, whether a party or not to any such cause or matter, who would have been entitled in England, prior to the passing of The Supreme Court of Judicature Act 1873, to apply to the court to restrain the prosecution thereof, or who may be entitled to enforce by attachment or otherwise any judgment, decree, rule or order contrary to which all or any part of the proceedings in such cause or matter may have been taken, shall be at liberty to apply to the court by motion in a summary way for a stay of proceedings, either generally or so far as may be necessary for the purpose of justice; and the court shall thereupon make such order as shall be just;
>
> [Emphasis Added]

[23] Section 37 does not contain similar language authorizing an application. It says only that nothing in *The Queen's Bench Rules* prevents a judge from granting a stay. It authorizes an application, but only in the circumstances specified in s. 37(2). In my view, s. 37(1) is best read as a reference to the inherent jurisdiction of the court, rather than a separate grant of authority: see *Cameron* at para 18. That interpretation is also consistent with the fact that s. 37(3) refers only to an application under s. 37(2), and not s. 37(1).

[24] The legal principles that apply are the same regardless of whether s. 37 is a separate grant of authority. Those principles were recently summarized by Ottenbreit J.A. in *Saskatchewan Medical Assn. v Anstead*, 2016 SKCA 143, as follows:

> **23** The doctrine of abuse of process has been explained and developed by Arbour J. in the oft quoted case of *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77 (S.C.C.) [*CUPE*]. More recently, it has been summarized in *Moulton Contracting Ltd. v. British Columbia*, 2013 SCC 26, [2013] 2 S.C.R. 227 (S.C.C.) [*Behn*]:
>
> > [39] In *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, Arbour J. wrote for the majority of this Court that the doctrine of abuse of process has its roots in a judge's inherent and residual discretion to prevent abuse of the court's process: para. 35; see also P. M. Perell, "A Survey of Abuse of Process", in T. L. Archibald and R. S. Echlin, eds., *Annual Review of Civil Litigation 2007* (2007), 243. Abuse of process was described in *R. v. Power*, [1994] 1 S.C.R. 601, at p. 616, as the bringing of proceedings that are "unfair to the point that they are contrary to the interest of justice", and in *R. v. Conway*, [1989] 1 S.C.R. 1659, at p. 1667, as "oppressive treatment". In addition to proceedings that are oppressive or vexatious and that violate the principles of justice, McLachlin J. (as she then was) said in her dissent in *R. v. Scott*, [1990] 3 S.C.R. 979, at p. 1007, that the doctrine of abuse of process evokes the "public interest in a

> fair and just trial process and the proper administration of justice". Arbour J. observed in *C.U.P.E.* that the doctrine is not limited to criminal law, but applies in a variety of legal contexts: para. 36.
>
> [40] The doctrine of abuse of process is characterized by its flexibility. Unlike the concepts of *res judicata* and issue estoppel, abuse of process is unencumbered by specific requirements. In *Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (C.A.), Goudge J.A., who was dissenting, but whose reasons this Court subsequently approved (2002 SCC 63, [2002] 3 S.C.R. 307), stated at paras. 55-56 that the doctrine of abuse of process:
>
> > engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute. It is a flexible doctrine unencumbered by the specific requirements of concepts such as issue estoppel. See *House of Spring Gardens Ltd. v. Waite*, [1990] 3 W.L.R. 347 [(C.A.)], at p. 358 ....
>
> [Emphasis in Original]

[25] Given the flexibility that is a key feature of the doctrine, I do not agree with the applicants' submission that the two conditions specified in the following statement by Scott L.J. in *Saint Pierre v South American Stores Ltd.*, [1935] All ER 408 (CA) at 414 [*Saint Pierre*] must always be present before a stay is granted:

> A mere balance of convenience is not sufficient ground for depriving a plaintiff of the advantages of prosecuting his action in an English Court if it otherwise properly brought. The right of access to the King's court must not be lightly refused; (ii) in order to justify a stay two conditions must be satisfied, one positive and the other negative; (a) the defendant must satisfy the court that the continuance of the action would work an injustice because it would be oppressive, or vexatious to him, or would be an abuse of the powers of the court in some other way, and (b) the stay must not cause an injustice to the plaintiff. On both the burden of proof is on the defendant.

[26] Similarly, I do not agree with the applicants' submission that a stay of proceedings ought not to be ordered unless it is "beyond all reasonable doubt" that the action should not be allowed to continue. Although Grotsky J. cited a passage from *Halsbury's Laws of Canada* in support of that proposition in *Jarvie*, he did so in the course of discussing his view that there is no set of rigid principles or criteria that govern the exercise of the court's discretion.

[27] In my view, the correct approach to this element of the test is that specified in *Saint Pierre*: that is, access to the court must not be lightly refused. That test was also adopted by Sherstibitoff J.A. in his oft-cited decision in *Sagon v Royal Bank* (1992), 105 Sask R 133 (Sask CA):

> **19** Finally, a separate mention should be made of the power of the court to prevent abuse of its process, a power which is inherent as well as conferred under Rule 173. Bullen & Leake defines the power as follows at pp. 148-9:
>
> > The term 'abuse of the process of the court' is a term of great significance. It connotes that the process of the court must be carried out properly, honestly and in good faith; and it means that the court will not allow its function as a court of law to be misused but will in a proper case, prevent its machinery from being used as a means of vexation or oppression in the process of litigation. It follows that where an abuse of process has taken place, the intervention of the court by the stay or even dismissal of proceedings, 'although it should not be lightly done, yet it may often be required by the very essence of justice to be done.'
>
> [Emphasis added]

2. Stay Application: Duplicative or Parallel Proceedings

[28] It is an abuse of process to commence two law suits that effectively deal with the same subject matter: *Englund v Pfizer Canada Inc.*,

2007 SKCA 62 at para 29, 299 Sask R 298. *Jarvie* was such a case. The court there considered the similarity between the two competing actions; whether it was likely that the action which would not be stayed would likely dispose of both actions; whether the stay would work an injustice to either party; and if so, which would suffer the greater injustice.

[29] Here, Onion Lake effectively sought to rely on this principle, despite the fact this application and the *Onion Lake Action* are between different parties, and in different courts. Onion Lake submitted that I should grant a stay because the constitutional issues are before the Federal Court in the *Onion Lake Action*. It argued that the applicants could, and should have, sought the same relief in Federal Court, by applying for intervenor status in the *Onion Lake Action*. It submitted that this action was duplicative, and that Onion Lake would be obliged to assert its constitutional position in two actions. It noted that would result in additional expense and thus prejudice to Onion Lake, the unnecessary use of additional court time, and the risk of conflicting results in this action and the *Onion Lake Action*.

[30] Onion Lake relied on the reasoning in *Garber v Canada (Attorney General)*, 2015 BCCA 385, [2016] 4 WWR 216 [*Garber*]. In *Garber*, Canada unsuccessfully sought to stay an action in the British Columbia Supreme Court in favour of a "test case" in Federal Court. Onion Lake also referred to *The Court Jurisdiction and Proceedings Transfer Act*, SS 1997, c C-41.1. It did not argue that Act applied, but rather – much like the Federal Crown in *Garber* - that the considerations referred to in s. 10(2), in relation to *forum non conveniens* should be taken into account. Those considerations include the comparative cost of the competing actions, avoiding a multiplicity of

proceedings and avoiding conflicting decisions, which are common concerns in this context. They also include the fair and efficient working of the Canadian legal system as a whole. Indeed, Onion Lake submitted – citing *Fujitsu Consulting (Canada) Inc. v Themis Program Management & Consulting Limited*, 2007 BCSC 1376, [2008] 8 WWR 568, a choice of forum decision in which the court (at para. 30) emphasized the public interest in seeing the justice system work efficiently throughout the country – that the fair and efficient Canadian justice system criteria is, in itself, reason enough to grant the stay.

[31] For reasons noted by counsel for the applicants, however, the respondent's submissions – to the extent that they depend on the notion that this action and the *Onion Lake Action* either are or engage the underlying concerns raised by parallel or duplicative proceedings – suffer from a fundamental flaw. This application is for the relief specified in ss. 10 and 11 of the *Act*. The constitutional issues have not been raised by any party to this application. I have not been asked to decide those issues, and would not do so by granting the order sought.

[32] There is, accordingly, no duplication. This application does not raise the same issues as the *Cold Lake* action. There is no risk that my decision in this case will be inconsistent with any decision that might be made in the *Onion Lake Action* in relation to the constitutional issues. Given that the constitutional issues are not in play in this action, Onion Lake will not be called upon to assert or defend its constitutional position in two actions. The last step in this application – but for my decision – was the hearing of the competing applications dealt with in this fiat. There will be no parallel

proceedings. As such, Onion Lake will not incur more legal fees or other costs in this proceeding, other than those which they may choose to incur to review my decision.

[33] Given that there are no competing actions in relation to the constitutional issues, there is also no need to weigh the competing benefits of this application and the *Onion Lake Action* in determining those issues. The possibility that a trial may be preferable is a red herring in any event. The procedural flexibility provided by *The Queen's Bench Rules* would have enabled Onion Lake – had it chosen to raise the constitutional issues in this action – to apply for an order that disclosure of documents, questioning and a trial be conducted in this case.

[34] The respondent suggested in its brief that it was somehow improper that the applicants chose to seek relief from this Court, rather than seeking intervenor status in the *Onion Lake Action*. I strongly disagree. Sections 10 and 11 of the *Act* provide that an application may be made to this Court. These applicants are not parties to any other action relating to the *Act*, in any court. They were not obliged to follow Onion Lake's lead as to the appropriate forum, the nature of the action, or the issues which should be engaged. They were not obliged to join an action driven by other parties which may have no interest in the expeditious resolution of the issues, which has proceeded at anything but breakneck speed, and which may never be concluded. Nor were they obliged to be intervenors, rather than full parties.

[35] The applicants seek relief in a timely fashion. As counsel noted, an election will be held at Onion Lake next year. The fact they chose to launch

this action does not have the slightest hint of impropriety, and is not an abuse of process. I concur with the following comments by Saunders J.A., in response to a similar argument in *Garber*:

> **27** ...Canada's proposition ...that the judge erred in declining to stay proceedings in the Supreme Court of British Columbia because Canada had designated a case in the Federal Court as the test case, comes very near to a challenge to the ability of the superior trial court in this province to manage its own processes. While saying the Supreme Court of British Columbia should defer to the Federal Court, the appellant is really saying in these circumstances it *must* defer to the Federal Court. Yet the path of two or more cases proceeding on similar or overlapping issues is well trod in Canada, and reflects the essential character of confederation, with architecture that respects the beauty of the differences between jurisdictions.

[36] It also bears noting that a decision in the *Onion Lake Action* would not – as the respondent initially submitted – dispose of this action in any event. That is so regardless of whether – as the applicants suggest – the Federal Court has no jurisdiction to make a general declaration of constitutional invalidity pursuant to s. 52 of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982*, (UK), 1982, c 11. That issue has not yet been conclusively resolved: see *Canadian Transit Company v Windsor (City)*, 2015 FCA 88 at paras 47-64, [2016] 1 FCR 265 where Stratas J.A. concluded that it does; *Windsor (City) v Canadian Transit Company*, 2016 SCC 54 at paras 70-71, [2016] 2 SCR 617 where Karakatsanis J. questions whether that is so; and *Burnaby (City) v Trans Mountain Pipeline ULC*, 2017 BCCA 132 at paras 34-35, which supports the conclusion it does not.

[37] It is not necessary that I decide this jurisdictional question. The applicants would be entitled to pursue this application, regardless of the Federal Court's jurisdiction. A judge hearing such an application in this Court

would not be bound by a declaration as to the constitutionality of the *Act* in the *Onion Lake Action*. He or she would be obliged to decide on the basis of the record before the court, and to reach his or her own conclusions in relation to the constitutional issues. Counsel for Onion Lake conceded that point. As in *Garber* (see para 21), a stay would merely postpone, but not resolve, the potential for inconsistent verdicts.

[38] Finally, the respondent's offer to provide Ms. Stick access to the consolidated financial statements – but not copies or the right to make copies – falls far short of tipping the balance. Indeed, it can be reasonably argued that it is irrelevant, absent duplicative proceedings which would call for an analysis of the relative injustice that would be suffered by the parties if the stay is refused. The *Act* has not been found to be unconstitutional on any ground by any court. The respondent's offer falls far short of providing the copies and public internet posting required by the *Act*. Onion Lake cannot ask for a stay on the basis that non–compliance is good enough, or that the *Act* is unjust.

3. Stay Application: the Federal Stay

[39] The respondent also took the position that this action should be stayed as a result of the Federal Stay. It initially said that this application constituted a collateral attack on the Federal Stay. It abandoned that position at the hearing, arguing instead that a failure to grant a stay of this application would undermine the "practical effect" of the Federal Stay, as that stay prevented the publication of the material specified in s. 7 of the *Act*. It also cast this argument in terms of the fair and efficient working of the Canadian legal system as a whole.

[40] Given that this argument does not engage the doctrine of collateral attack, I understood it as either an element of the respondent's abuse of process argument, or a request that I apply what is, in effect, a variant of the doctrine of issue estoppel. Regardless of how it is characterized, it is my respectful opinion that it is without merit in law and on the facts. Barnes J. did not decide that Onion Lake should not be ordered to publish the consolidated financial statements, at large. He decided on the facts, in a dispute between particular parties, for particular reasons. Here, the facts and parties are different. There are no duplicative proceedings. Further, an order to disclose in favour of Ms. Stick and the CTF does not raise the same concerns as an order in favour of Canada. Mr. Stick and the CTF are not players in the consultation process. The order sought by the applicants will not undermine the Federal Stay.

D. CONCLUSION

[41] In the result, the application for a stay is dismissed. Indeed, Onion Lake conceded that the applicants are, absent the constitutional and stay issues, entitled to such an order.

[42] It is accordingly ordered that Onion Lake comply with the duties imposed by s. 7 and s. 8 of the *Act*, within 30 days of the date of this fiat. The parties' have leave to speak to costs.

J.
B.A. BARRINGTON-FOOTE

QUEEN'S BENCH FOR SASKATCHEWAN

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Counsel:

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CORRIGENDUM TO JUDGMENT DATED JUNE 15, 2017
June 20, 2017 BARRINGTON-FOOTE J.

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[1] Pursuant to Rule 10-10(a) of *The Queen's Bench Rules*, para. 42 of the judgment of June 15, 2017 shall be amended by adding the words "and s. 8" after the words "s. 7".

B. Barrington-Foote J.
B.A. BARRINGTON-FOOTE